NO. 33091

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

DANIEL R. STRAHIN,

Appellant,

vs.

From the Circuit Court of
Barbour County, West Virginia
CIVIL ACTION NO. 99-C-7

EARL SULLIVAN and
FARMERS & MECHANICS
MUTUAL INSURANCE COMPANY
OF WEST VIRGINIA, INC.,

Appellees.

REPLY OF THE APPELLANT

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COMES NOW, the Appellant, Daniel R. STRAHIN, and respectfully replies to the *Brief of the Appellee* filed by FARMERS & MECHANICS Mutual Insurance Company Of West Virginia, Inc. ("FARMERS & MECHANICS").

The dispositive issue to be resolved in the matter *sub judice* is whether a Shamblin claim may be assigned prior to an excess jury verdict.

Appellant STRAHIN argues the answer is YES because first-party bad faith claims are assignable and a "covenant not to execute" protects the insured from personal liability while preserving the ability to prosecute a Shamblin claim if the verdict exceeds policy limits. Appellant's argument may be succinctly stated as follows:

1. The insurance contract gives rise to a common law duty of good faith and fair dealing running from an insurer to its insured. Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986); Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998). This obligation includes the contractual and implied duty of good faith and fair dealing to settle claims against its insureds. Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766, Syl. Pt. 2 (1990);
2. West Virginia law permits the assignment of a first-party bad faith claim. Cook v. Eastern Gas & Fuel Associates, 129 W. Va. 146, 155, 39 S.E.2d 321, 326 (W. Va. 1946) (citing W. Va. Code § 55-8-9);
3. An overwhelming majority of foreign jurisdictions permit the assignment of a bad faith claim when coupled with a covenant not to execute. Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995); Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128 (D.C. Cir. 1989);

4. There is no statutory or common law prohibition to the pre-judgment assignment of chose of action. A judgment may be assigned "even prior to payment." Boarman v. Boarman, 210 W.Va. 155, 158, 556 S.E.2d 800, 803 (W.Va. 2001);

5. The *Assignment and Covenant Not to Execute* is a valid contractual assignment of a first-party bad faith claim which permits Appellant, DANIEL R. STRAHIN, to "stand in the shoes" of Earl SULLIVAN following the excess verdict returned in Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004); and

6. Public policy supports the assignment of a Shamblin cause of action to effectuate the purpose of protecting the insured when an insurer plays "we bet your house."

Appellee FARMERS & MECHANICS argues the answer to the dispositive issue is NO because the "covenant not to execute" operates as a release of the insured thereby negating the insurer's "legal obligation to pay" the excess verdict. Appellee's argument should be rejected on the following grounds:

1. FARMERS & MECHANICS argues that Appellant STRAHIN cannot "satisfy the essential legal elements of a Shamblin claim" following the assignment. *Brief of the Appellee* at p. 13, 24. However, nowhere in the *Brief of the Appellee* does Farmers & Mechanics identify which elements are lacking. The elements of a Shamblin claim are as follows:

> Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has *prima facie* failed to act in its insured's best interest and such failure to so settle *prima facie* constitutes bad faith toward its insured.

Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766, Syl. Pt. 2 (1990). The following are undisputed facts recited in chronological order:

a. STRAHIN was injured by the negligent conduct of SULLIVAN;

b. STRAHIN filed a civil action against SULLIVAN;

c. SULLIVAN was insured under a policy of insurance issued by FARMERS & MECHANICS with policy limits of One Hundred Thousand Dollars ($100,000.00);

d. STRAHIN offered to settle within policy limits and release SULLIVAN from any and all personal liability;

e. FARMERS & MECHANICS refused the offer of settlement thereby exposing SULLIVAN to a potential excess verdict;

f. STRAHIN and SULLIVAN entered into a *Assignment and Covenant Not to Execute* (R. 53-55)[1]; and

g. A jury returned a verdict in excess of policy limits in the amount of One Million Sixty Thousand Five Hundred Fifty-Six Dollars ($1,060,556.00).

Appellant submits these facts, in the absence of subparagraph (F), state a cause of action by SULLIVAN against FARMERS & MECHANICS under Shamblin. A Shamblin claim is a "chose of action" which is assignable. Boarman v. Boarman, 210 W.Va. 155, 159, 556 S.E.2d 800, 804 (W.Va. 2001). If STRAHIN truly "stands in the shoes" of SULLIVAN, then a cognizable claim under Shamblin presently exists and this matter should be remanded to proceed on its merits.

The illogic of Appellee's argument is revealed by asking a simple question: If there were no assignment, could SULLIVAN articulate a viable Shamblin claim against FARMERS & MECHANICS? The answer is YES. If so, then what impairs STRAHIN's ability to "step into the shoes" of SULLIVAN? FARMERS & MECHANICS must engage in legal gymnastics to

[1] Appellee argues that "when an insured is protected from any personal liability by the execution of a covenant not to execute with the plaintiff, the insured's 'hard-won personal estate' is not in jeopardy when an insurer refuses an offer of settlement." *Brief of Appellee* (p. 15). It should be noted the *Assignment and Covenant Not to Execute* was entered AFTER Farmers & Mechanics twice rejected offers to settle for policy limits. The largest settlement offer made by Farmers & Mechanics was $5,000.00 six days before trial.

resolve this question in its favor. Appellee must argue the Shamblin claim is assignable (for if the assignment is void, then, SULLIVAN could bring the Shamblin claim in his own name). However, FARMERS & MECHANICS must also argue the Shamblin claim is somehow unenforceable by virtue of the assignment.

The only logical argument Appellee can muster is that the "covenant not to execute" somehow operates as a technical release of the insured thereby insulating FARMERS & MECHANICS from legal responsibility for its bad faith. Presumably, such a release means the SULLIVAN can suffer no damages by the alleged intransigence of the insurer.

2. Appellee cannot cite to a single foreign jurisdiction in the country which interprets a "covenant not to execute" as a release of the insured's personal assets. *Brief of the Appellee* at p. 15, 20. To the contrary, nearly every jurisdiction in the country has rejected such an argument. See *Brief of Appellant* at Part IV.B.1 at pp. 15-17.

3. Appellee cites to several consent judgment cases from Texas to support its argument. *Brief of Appellee* pp. 18-20, 26. THIS IS NOT A CONSENT JUDGMENT CASE. FARMERS & MECHANICS misunderstands why the cases cited by Appellant are instructive while the Texas cases are not instructive. Therefore, it is important to frame the context of the question presented. The dispositive issue has two sub-parts: a broader issue involving a legal question and a narrower issue regarding the application of the same. Each is addressed in turn.

The broader issue, or initial inquiry, is whether a bad faith claim is assignable and whether a covenant not to execute operates as a release. Appellant respectfully submits the answer to the former is YES and the answer to the latter is NO. An overwhelming majority of, if not all, foreign jurisdictions support this proposition.

The narrower issue, or secondary question, is the application of such a conveyance to first-party bad faith claims. There are three scenarios common in the arena of insurance litigation: (1) enforcement of judgments within policy limits following a consent judgment (without adjudication); (2) enforcement judgments in excess of policy limits following a consent judgment (without adjudication); and (3) enforcement of judgments in excess of policy limits following an adverse jury verdict.

Fact pattern #1 is analogous to Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995) cited by Appellant. Every jurisdiction in the country enforces such consent judgments (even Texas). The reasoning in the Red Giant line of cases supports the broader question referenced above and directly refutes FARMERS & MECHANICS contention that a "covenant not to execute" operates as a release. See *Brief of the Appellee* at p. 15, 20. Appellee should readily concede this point.

Fact pattern #2 is analogous to Wilcox v. American Home Assurance Co., 900 F. Supp. 850 (S.D. Ct. Tex. 1995) cited by Appellee. The reasoning of the Wilcox line of cases STILL supports the broader question referenced above. This subtle point is ignored by Appellee. However, the application of the broader issue to fact pattern #2 is a far "more difficult question, one not ripe for consideration here." Kobbeman v. Oleson 574 N.W.2d at 638-39; *see also* Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D. W. Va. 2003) (predicting West Virginia law)[2]. The "difficulty" arises out of the enforcement of a stipulated judgment in excess

[2] Johnson v. Acceptance Ins. Co. is a 2003 federal district court case arising out of the Northern District of West Virginia. The federal Court considered the enforcement of a consent judgment above policy limits under West Virginia law. See Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D. W. Va. 2003) (holding a consent judgment coupled with a covenant not to execute is enforceable as far as the policy limits allow); see also Romstadt v. Allstate Ins. Co., 59 F.3d 608 (6th Cir. 1995); Whatley v. City of Dallas, 758 S.W.2d 301 (Tex. App.-Dallas 1988).

of policy limits in the absence of an adjudication; an indispensable factual predicate to a Shamblin claim.

This appeal arises out of an adverse jury verdict in excess of policy limits; not a consent or stipulated judgment. Thus, while the reasoning of the Wilcox line of cases is insightful for resolving the broader issue (in favor of Appellant), it is not helpful in resolving the narrower issue presented in fact pattern #3.

Fact pattern #3 involves a jury verdict in excess if policy limits and is analogous to Pinto v. Allstate Ins. Co., 221 F.3d 394, 403 (2nd Cir. 2000), J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America, 696 N.W.2d 681 (Mich. 2005), and Glenn v. Fleming, 799 P.2d 79 (Kan. 1990). All three cases support the Appellant's argument resolving the broader issue as well as the narrow issue. Appellee can cite to no authority analogous to fact pattern #3 to support its position.

In summary, Appellant cites authority which supports resolution of the broader issue and fact pattern #3 in his favor. Appellee can cite to no authority to support its position regarding the resolution of the broader issue nor fact pattern #3. Appellee repeatedly cites to cases addressing fact pattern #2; an issue not ripe for consideration.

4. FARMERS & MECHANICS presents in Part I of the *Brief of the Appellee* a nebulous rule that a "covenant not to execute" somehow operates as a release. Such a rule is unworkable and presents greater detriments than benefits.

First, under the nebulous rule proposed by Appellee, when can an insured assign a Shamblin claim? The following scenarios illustrate the fallacy of Appellee's argument:

a. **Does a Shamblin survive if assigned before trial?** Appellee would answer NO because the insured is "released from personal liability" and the insurer is no longer "legally obligated to pay" the judgment;

b. **Does Shamblin survive if assigned during trial?** The Appellee's answer logically remains the same under the nebulous rule asserted in paragraph (a);

c. **Does Shamblin survive if assigned after trial but before the entry of final judgment?** The answer remains the same;

d. **Does Shamblin survive if assigned after trial and after entry of final judgment but before an appeal is filed?** The answer remains the same; and

e. **Does Shamblin survive if assigned after trial and after entry of final judgment and after all appellate issues are resolved?** The answer remains the same.

The fallacy of Appellee's proposed rule, aside from it being rejected by every other jurisdiction in the country, is that it necessarily applies to all five (5) scenarios above. So, **when can a viable Shamblin claim be assigned?** The answer must logically be NEVER. If, as Appellee argues, the Shamblin claim is operable only as long as the insured's assets are at stake, then any assignment at any time renders the Shamblin claim unenforceable.[3]

[3] It merits repeating, again, that the Assignment and Covenant Not to Execute in the instant matter was entered after FARMERS & MECHANICS rejected two offers of settlement within policy limits. "When [Farmers & Mechanics] rejected the settlement offers, it subjected itself to liability for the excesses damages incurred by its insured." Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 596, 396 S.E.2d 766. 777 (1990).

This "catch 22" results in the assignment of a chose in action which renders the subject of the assignment unenforceable. No Plaintiff will ever accept an assignment of a Shamblin claim if such a rule is adopted. This is a bad rule.

Second, the Appellee definitively argues for the adoption of the following rule in Part II of the *Brief of the Appellee*: "When an insured is protected from any liability arising from a judgment, he cannot be deemed 'legally obligated to pay' anything to a plaintiff who holds a judgment against him." (p.25). This is an even worse rule.

Appellee's argument necessarily applies to consent judgments and judgments within policy limits. "After all, if the release of [SULLIVAN] extinguished the claim [SULLIVAN] had against the insurance company simultaneously with the assignment of the claim, that would also be true of that part of the claim [SULLIVAN] had against the insurance company within policy limits." Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1133 (D.C. Cir. 1989). Such an argument is "absurd." Id.

The "legal obligation to pay" the claim within policy limits was triggered at the time of STRAHIN's injury. The "legal obligation to pay" the excess verdict was triggered by the refusal to settle within policy limits. The damages were quantified when the jury returned the adverse verdict. Whether or not the assignment was made prior to the jury verdict is irrelevant. The assignment changed only the identity of the party who was entitled to assert the Shamblin claim once an excess verdict was obtained. See Egger v. Gulf Insurance Co., 903 A.2d 1219 (Pa. 2006).

5. Appellee's commentary regarding Glenn v. Fleming, 799 P.2d 79 (Kan. 1990) and Kobbeman v. Oleson, 574 N.W.2d 633 (S.D. 1998) is bizarre. *Brief of the Appellee* at pp16-17.

The Glenn case from Kansas is nearly identical to the instant matter and supports the Appellant's argument; not the other way around. *Brief of the Appellant* at pp. 15, 21, 24 and 28. Ironically, the two syllabus points announced in Glenn were used as a framework for the syllabus points proposed in the *Brief of the Appellant* (Part IV.F at p. 26). Appellant respectfully submits the Supreme Court of Kansas would disagree with FARMERS & MECHANICS interpretation of its Glenn case.

Moreover, the Appellee butchers the holding in Kobbeman from South Dakota. Kobbeman considered precedent from several consent judgment cases to determine whether an automobile accident victim, as the assignee of a tortfeasor, could pursue a cause of action against an insurance broker for the failure to procure umbrella insurance. The insurance company argued that the failure to secure a judgment against the tortfeasor prior to the assignment rendered the excess claim moot. The insurance company argued, just as FARMERS & MECHANICS in the instant matter, that the assignee "suffer[ed] no damages and thus an essential element of the cause of action was missing." Kobbeman v. Oleson, 574 N.W.2d at 634.

The Supreme Court of South Dakota REJECTED the insurance company's argument; not the other way around. Appellee selectively quotes three sentences from the middle of a longer paragraph in Kobbeman to make its point. A full reading of the paragraph illustrates the fallacy of the Appellee's argument:

> Other decisions look not to the timing, but to the language of the covenant not to execute. "Whether the assignment was made of a judgment in existence or a judgment to come into existence is not determinative of whether or not the insured's assignee may maintain an action against the insurance company." *Lancaster*, 726 P.2d at 374. *See also Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1389 (D.C.1996) (the debt "for which an insurer becomes liable is fixed at the time of loss even though the amount of the compensation is still to be ascertained."). **In bad faith refusal to settle cases, a rule mandating post judgment assignment is more imperative because, in**

> **most instances, no cause of action solidifies until judgment is rendered against an insured. On the other hand, in failure to procure insurance cases, claims may reasonably arise long before a judgment. We conclude, with assignments of causes of action for failure to procure insurance, a judgment establishing a loss is critical, but its timing is not.** A more difficult question, one not ripe for consideration here, is whether a judgment obtained without full adversary proceedings will suffice. This is an old quandary. Long ago, Holmes' concern about the alienation of choses in action involved "the difficulty of transferring a mere right ··· when the situation of fact from which it sprung could not also be transferred." O. Holmes, *The Common Law,* 409 (Dover 1991) (1881). In any event, so long as one ultimately obtains a judgment in the underlying action to establish the loss before proceeding to trial on the assigned claim, it is not crucial whether the judgment precedes or follows the assignment.

Kobbeman v. Oleson 574 N.W.2d at 638-39 (Appellee's selective quotation emphasized in bold) (citations omitted). To argue that Kobbeman stands for the proposition that "pre-judgment assignments of an insured's claims for bad faith have been disapproved" or that the "timing of an assignment" is dispositive (*Brief of the Appellee* at p. 17) is simply wrong. Appellant respectfully submits the Supreme Court of South Dakota would object to such an interpretation of its Kobbeman case.

6. FARMERS & MECHANICS argues in its *Brief of the Appellee* that the *Assignment and Covenant Not to Execute* did not "include Shamblin rights" (p.24). Such an argument is wrong. First, the Assignment and Covenant Not to Execute specifically states:

> Earl Sullivan does hereby assign to Plaintiffs, their heirs, all representatives and **assigns, all of his rights, presently existing or which might hereafter arise**, whether in contract or tort, to seek compensation, indemnity, defense, compensatory damages, punitive damages, relating to or arising from the Farmers & Mechanics Policy, including but not limited to all claims based on unfair settlement practices, Bad Faith[4], or refusal to provide defense and/or indemnity.

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[4] "The phrase 'bad faith' was developed to describe the common law action against an insurer. The phrase 'unfair settlement practices' was developed to describe the statutory action against an insurer. Because the statutory claim actually includes the elements of a cause of action for the common law claim, our cases use the two phrases interchangeably. As a result of the historical lack of distinction between the two phrases ··· we see no need to deviate from our traditional practice of using the two phrases interchangeably." State ex rel. Allstate Ins. Co. v.

Assignment and Covenant Not to Execute (R.53-55) (emphasis added). Moreover, counsel for FARMERS & MECHANICS jointly drafted the document and jointly presented the same for entry in the record. See February 7, 2001 HEARING TRANSCRIPT attached to the appellate record (R. 174).

It should be noted that following the adverse verdict FARMERS & MECHANICS hired new counsel and now asserts a nifty "gotcha" to an agreement it previously drafted and presented to the Circuit Court for entry in the record.

7. FARMERS & MECHANICS only public policy argument is the spectre of collusion. *Brief of Appellee* at p. 29. Our system of justice is adequately equipped to discern the existence of fraud and collusion. *Brief of Appellant* at p. 23. Moreover, FARMERS & MECHANICS is free to raise the issue as an affirmative defense.

From a public policy standpoint, there is simply no good reason to prohibit pre-judgment assignments of a Shamblin claim:

a. There is no facially evident legal prohibition;

b. Fraud or collusion can be raised as an affirmative defense;

c. There is no justified reason to permit post-judgment assignments but prohibit pre-judgment assignments;

d. Assignments promote the purpose of Shamblin; namely, the protection of the INSURED when the insurer plays "we bet your house" at trial. Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. at 599, 396 S.E.2d at 780 (Neeley, J., concurring).

Gaughan, 203 W.Va. 358, 508 S.E.2d 75, fn. 13 (W.Va. 1998) (citing Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (W.Va. 1998)).

To the contrary, there are plenty of bad reasons to adopt the position advanced by FARMERS & MECHANICS:

a. Appellee's nebulous rule regarding the "covenant not to execute" also applies to consent judgments thus bringing the practice to an end in West Virginia;

b. Appellee's rule regarding the "legal obligation to pay" results in the "absurd" application to claims within policy limits;

c. Appellee's argument applies equally to Shamblin assignments entered the day before a jury verdict is returned as well as the day after. Both assignments would negate the insurer's "legal obligation to pay" thus bringing an end to the practice of assigning a Shamblin claim. The plaintiff would be left with no choice but to enforce judgment against the insured. The insured would then stave off bankruptcy while simultaneously prosecuting a Shamblin claim[5];

d. Shamblin is intended to protect the INSURED – not the insurer acting in bad faith; and

e. It is bad public policy to strip away the protections afforded by Shamblin to an insured, whether the insured is an individual or a small business, when an insurer acts in bad faith and plays "we bet your house" (and then loses).

[5] As aptly noted by FARMERS & MECHANICS in its *Brief of the Appellee* (p. 14), a Shamblin cause of action is not an entitlement to recovery. The standard adopted in Shamblin to recover an excess verdict is a "hybrid negligence – strict liability" theory of liability. The prosecution of the actual Shamblin case spanned five years and two days from the entry of judgment on the underlying case to the verdict on the bad faith case. Most insureds could not financially survive if they/it had to pay the excess verdict and then seek indemnification from the insurer for bad faith.

8. Finally, the Appellee's argument was rejected by yet another jurisdiction during the Briefing Schedule of the instant matter. See Egger v. Gulf Ins. Co., 903 A.2d 1219 (Pa. 2006) (decided August 23, 2006). The Egger case is instructive on the points of pre-judgment assignment of a bad faith claim prior to an excess verdict and the insurer's "legal obligation to pay." The Egger case supports the position advanced by the Appellant.

CONCLUDING REMARKS

FARMERS & MECHANICS gambled at trial and lost. Now FARMERS & MECHANICS must engage in legal gymnastics to avoid financial responsibility. It must somehow argue first-party bad faith claims are assignable – yet unenforceable thereafter. It must carve out a rule which insulates itself from the excess verdict rendered in STRAHIN I while preserving the body of law which supports assigning a chose in action. Such a rule would constitute an unprecedented departure from the clear weight of foreign jurisdictional authority.

The principle of "Occam's razor" states that the simplest of two or more competing theories is preferable. The answer to the dispositive issue in the case is simple. STRAHIN stands in the shoes of SULLIVAN and the Shamblin case should be reinstated and remanded to the Circuit Court of Barbour County to proceed on its merits.

As noted by Supreme Court of Kansas: "Emphasis should be placed on the recognition that an insurer may avoid liability for bad faith by acting in good faith and, consequently, will sustain no excess judgment responsibility." Glenn v. Fleming, 799 P.2d 79, 93 (Kan. 1990).

RESPECTFULLY SUBMITTED,

DANIEL R. STRAHIN,
By Counsel

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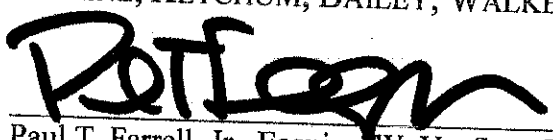

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CERTIFICATE OF SERVICE

I, Paul T. Farrell, Jr., Esq., do hereby certify that I have filed and forwarded by United States Mail the **"Reply of the Appellant"** and served the same upon the following counsel of record by mailing a true copy thereof, by United States mail, postage prepaid, on this 25th day of October, 2006:

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An original and (9) copies have been filed with the Clerk of the Supreme Court.

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